Public Prosecutor v Kenneth Fook Mun Lee (No 1)

HIGH COURT (KUALA LUMPUR) — ARREST CASE NO B81–24 OF 2000
AUGUSTINE PAUL J
19 APRIL 2001

Criminal Law *— Defence of automatism — Insane automatism — Burden on accused to establish his condition of mind at time of commission of offence — Whether prosecution entitled to adduce evidence in rebuttal — Penal Code s 84*

Evidence *— Fresh or further evidence — Calling of after close of defence — Defence of accused that he was in state of automatism at time of incident — Whether prosecution may adduce evidence in rebuttal — Principles applicable*

The accused was charged with an offence of murder under s 302 of the Penal Code. He claimed trial to the charge. The defence suggested by the accused was that he had an hypoglycaemic attack at the time of the incident and was therefore in a state of automatism. When the defence was called, the accused called several witnesses to establish this defence. At the close of the defence case, the prosecution applied for leave to adduce evidence in rebuttal.

Held, allowing the application:

(1) The Malaysian position was no different from that in England because in both jurisdictions, the evidence to be adduced by the prosecution after the defence had closed its case need not be one that no human ingenuity could have foreseen. It was sufficient if the evidence was not reasonably foreseeable (see p 571F–G).

(2) In a case falling within s 84 of the Penal Code, the burden to establish insanity was on the accused. There was no obligation on the prosecution to adduce evidence to show that the accused was sane at the time of the commission of the offence. When the burden shifted to the prosecution, it must lead evidence to establish the sanity of the accused. The prosecution could therefore discharge this burden by adducing evidence only after the close of the defence case. This was the position even if the prosecution had been notified that the defence would be one of insanity. Where the prosecution was allowed to give evidence in rebuttal, the defence may be given the right to give evidence in subrebuttal (see pp 573G, I–574C, G); *Pendakwa Raya v Adam bin Jaafar* Federal Territory Cr Trial No 55–2 of 1987 not followed.

(3) In law, there were two types of automatism, namely, insane and non-insane automatism. Insane automatism was where the primary cause of the abnormality was internal to the accused and prone to recur and this condition was classified as a disease of the mind and fell within the McNaghten rules. Non-insane automatism, on the other hand, occurred where the abnormality was caused by a factor external to the accused, for example,

a blow to the head, medication, alcohol or drugs (see p 575 C–D).

(4) The distinction between insane and non-insane automatism was important as it would determine the onus of proof. Where the condition was a disease of the mind, the onus was on the defence to establish the defence. If the condition did not produce a disease of the mind, the onus would be on the prosecution to exclude the alleged incapacity (see pp 575G, I–576A).

(5) The evidence showed that the cause of the accused's alleged low blood sugar and the resultant hypoglycaemic attack was not known. It was not caused by any medication and there was no evidence of it being caused by any external factor and it was prone to recur. Therefore, the abnormality of the accused must be classified as insane automatism and his defence thus fell within s 84 of the Penal Code. Accordingly, the burden was on him to establish his condition of mind at the time of the commission of the offence. The prosecution was therefore entitled to adduce evidence in rebuttal and the defence may adduce evidence in subrebuttal if there was a need for it (see p 576B–C).

[**Bahasa Malaysia summary**

Tertuduh telah dituduh atas kesalahan membunuh di bawah s 302 Kanun Keseksaan. Beliau telah meminta perbicaraan atas tuduhan tersebut. Pembelaan yang disarankan oleh tertuduh adalah bahawa beliau mendapat serangan hipoglisemik pada waktu kejadian itu dan adalah dengan itu dalam keadaan automatisme. Ketika pembelaan tersebut dipanggil, tertuduh telah memanggil beberapa saksi untuk membukti pembelaan ini. Pada penutupan kes pembelaan, pihak pendakwaan telah memohon kebenaran untuk mengemukakan keterangan pematahan.

Diputuskan, membenarkan permohonan tersebut:

(1) Kedudukan di Malaysia tiada bezanya dengan kedudukan di England kerana dalam kedua-dua bidang kuasa, keterangan yang harus dikemukakan oleh pihak pendakwaan selepas pembelaan menutup kesnya tidak semestinya merupakan keterangan yang kebijaksanaan manusia tidak dapat ramalkan. Adalah memadai jika keterangan tersebut tidak dapat diramalkan dengan sewajarnya (lihat ms 571F–G).

(2) Dalam kes yang terlingkung di dalam s 84 Kanun Keseksaan, bebanan untuk menentukan ketidak-siuman adalah terletak pada tertuduh. Pihak pendakwaan tidak berkewajipan untuk mengemukakan keterangan bagi menunjukkan bahawa tertuduh siuman ketika melakukan kesalahan tersebut. Ketika bebanan itu beralih kepada pihak pendakwaan, ia semestinya mengemukakan keterangan bagi menentukan keadaan siuman tertuduh. Pihak

pendakwaan oleh itu boleh melepaskan bebanan ini dengan mengemukakan keterangan hanya selepas penutupan kes pihak pembelaan. Ini adalah kedudukannya meskipun jika pihak pendakwaan telah diberitahu bahawa pembelaan adalah atas sifat ketidak-siuman. Di mana pihak pendakwaan dibenarkan memberikan keterangan pematahan, pihak pembelaan boleh diberikan hak untuk memberikan keterangan pematahan kembali (subrebuttal) (lihat ms 573G, I–574C, G); *Pendakwa Raya v Adam bin Jaafar* Federal Territory Cr Trial No 55–2 of 1987 tidak diikut.

(3) Di sisi undang-undang terdapat dua jenis automatisme, iaitu, automatisme hilang akal dan tidak hilang akal. Automatisme hilang akal adalah di mana sebab utama keadaan tidak normal tersebut adalah perkara dalaman kepada tertuduh dan mempunyai kecenderongan untuk berlaku semula dan keadaan ini diklasifikasikan sebagai penyakit gila dan terlingkung di dalam lingkungan kaedah McNaghten. Automatisme tidak hilang akal, sebaliknya, berlaku di mana keadaan tidak normal itu telah disebabkan oleh faktor luaran kepada tertuduh, contohnya, satu pukulan kepada kepalanya, ubat-ubatan, alkohol atau dadah (lihat ms 575C–D).

(4) Perbezaan antara automatisme hilang akal dan tidak hilang akal adalah penting kerana ia akan menentukan beban membukti. Di mana keadaannya adalah merupakan penyakit fikiran, bebanan terletak pada pihak pembelaan untuk menentukan pembelaan. Jika keadaan tersebut tidak menghasilkan penyakit fikiran, bebanan akan terletak pada pihak pendakwaan untuk mengecualikan ketidak-upayaan yang didakwa (lihat ms 575G, I–576A).

(5) Keterangan menunjukkan bahawa sebab paras gula dalam darah yang rendah yang dialami oleh tertuduh yang didakwa dan serangan hiploglisemik yang diakibatkan olehnya tidak diketahui. Ia telah tidak disebabkan oleh sebarang ubat-ubatan dan tiada bukti ia disebabkan oleh sebarang faktor luaran dan ia berkemungkinan akan berlaku semula. Oleh itu, sifat tidak normal tertuduh mestilah diklasifikasikan sebagai automatisme hilang akal dan pembelaan beliau dengan itu terlingkung di dalam lingkungan s 84 Kanun Keseksaan. Sehubungan itu, bebanan adalah terletak ke atas tertuduh untuk menunjukkan keadaan fikiran beliau ketika melakukan kesalahan tersebut. Pihak pendakwaan adalah dengan itu berhak untuk mengemukakan keterangan pematahan dan pihak pembelaan boleh mengemukakan keterangan pematahan kembali jika perlu (lihat ms 576B–C).]

Notes

For cases on s 84 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1026–1035.For cases on calling of fresh or

further evidence after close of defence, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1409–1412.

Cases referred to

Bratty v Attorney-General for Northern Ireland (1961) 46 Cr App R 1 (refd)
Chaulk v R (1991) 62 CCC (3d) 193 (refd)
Chia Leong Foo v PP [2000] 6 MLJ 705 (refd)
Dahyabhai v The State AIR 1964 SC 1563 (refd)
Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor [1988] 1 MLJ 174 (refd)
John v R (1985) 23 CCC (3d) 326 (refd)
Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri [1994] 3 MLJ 285 (refd)
Over v Harwood [1900] 1 QB 803 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
Pendakwa Raya v Adam bin Jaafar Federal Territory Cr Trial No 55–2 of 1987 (not folld)
Police v Bannin [1991] 2 NZLR 237 (refd)
R v Abramovitch (1912) 7 G App R 145 (refd)
R v Barry Douglas Burgess (1991) 93 Cr App R 41 (refd)
R v Bourne (1939) 1 KB 687 (refd)
R v Campbell (1977) 38 CCC (2d) 2 (refd)
R v Chaulk (1991) 62 CCC (3d) 193 (refd)
R v Chin (1985) 69 ALR 1 (refd)
R v Crippen (1910) 1 KB 149 (refd)
R v Day [1940] 1 All ER 402 (refd)
R v Frost (1839) 4 St Tr (NS) 86 (refd)
R v Frost (1839) Car & P 129 (refd)
R v Gilbert Smith (1912) 8 Cr App R 72 (refd)
R v Hennessy [1989] 2 All ER 9 (refd)
R v Higgins (1902) 7 CCC 68 (refd)
R v Hilditch (1832) 5 Car & P 986 (refd)
R v Kasperek (1951) 101 CCC 375 (refd)
R v Krause (1987) 29 CCC (3d) 385 (refd)
R v Lobell [1957] 1 QB 547 (refd)
R v McKenna (1956) 40 Cr App R 65 (refd)
R v Milliken (1969) 53 Cr App R 330 (refd)
R v Morgentaler (No 3) (1973) 14 CCC (2d) 453 (refd)
R v Owen (1952) 36 Cr App R 16 (refd)
R v Pilcher (1974) 60 Cr App R 1 (refd)
R v Quick [1973] QB 910 (refd)
R v Rice [1963] 1 QB 857 (refd)
R v Scott (1984) 79 Cr App R 49 (refd)
R v Sullivan (1922) 16 Cr App R 121 (refd)
R v Therein and Sanseverino (1943) 80 CCC 87 (refd)
R v Wong On and Wong Gow (1904) 10 BCR 555 (refd)
Re H Daniel [1935] MLJ 50 (refd)

A *Shaw v R* (1952) 85 CLR 365 (refd)
Sinnasamy v PP [1956] MLJ 36 (refd)
Taylor v R (1979) 22 ALR 599 (refd)
Thompson v R [1918] AC 221 (refd)

B **Legislation referred to**

Criminal Procedure Code s 348
Evidence Act 1950 s 105
Evidence Act [India] s 105
Penal Code ss 84, 302

C *Muhammad Shafee Abdullah* (*K Kumarendran, Wong Kian Kheong, Leena Ghosh, Rabinder Singh* and *Dev Kumarendran* with him) (*Shafee & Co*) for the accused.

Abdul Karim bin Jalil (*Abdul Wahab bin Mohamad, Ahmad Fairuz bin Zainal Abidin* and *Rosidah bte Abu Bakar* with him) (Deputy Public Prosecutors) for the prosecution.

D *Hasmaliza* (*BK Seah* and *MY Hoong* with her) watching brief for the family of the deceased.

Augustine Paul J: The accused was charged with an offence of murder under s 302 of the Penal Code ('the Code'). He claimed trial to the charge. The prosecution called a total of 17 witnesses in support of its case. The

E defence suggested by the accused was that he had an hypoglycaemic attack at the time of the incident. When the defence was called, the accused called several witnesses to establish this defence. At the close of the defence case the prosecution applied for leave to adduce evidence in rebuttal. This judgment is concerned with the legal basis of the application.

F The learned deputy public prosecutor said that he wished to call Dr Norshina bte Dato Kamaruddin, an endocrinologist, Dato Dr Abdul Aziz bin Abdullah, a psychiatrist, and possibly another doctor to testify on the issue of intoxication. He referred to *Sinnasamy v PP* [1956] MLJ 36 and said that the defence of hypoglycaemia, relied on by the defence, places an onus on the accused to establish it on a balance of probabilities. As such, he

G said, the prosecution may adduce evidence in rebuttal. He referred to my judgment in *Chia Leong Foo v PP* [2000] 6 MLJ 705 where I had discussed the circumstances in which evidence in rebuttal may be called. An instance where the prosecution may call evidence in rebuttal is where the onus of proof of an issue is on the accused. It was also argued that the defence of

H hypoglycaemia was put generally without specifying any particular area and, in any event, the nature of the evidence to be called was not made known to facilitate the prosecution in calling witnesses in the course of its case. In his argument in opposition, Dato Shafee Abdullah, leading counsel for the accused, relied heavily on the case of *R v Frost* (1839) 4 St Tr (NS) 86 referred to by the High Court of Australia in *Shaw v R* (1952) 85 CLR 365,

I where Dixon, McTiernan, Webb and Kitto JJ said at pp 378–380:

> Now an extremely strict rule has been adopted in the English Court of Criminal Appeal with respect to the discretionary power of a presiding judge

to allow the prosecutor to call evidence after the close of the case for the defence. The rule is adopted from the language attributed to Tindal CJ in the report of *R v Frost* (1839) 4 St Tr (NS) 86. His Lordship is reported to have said:— 'There is no doubt that the general rule is that where the Crown begins its case, like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of the defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown'. The great limitation contained in this language lies, not in the expression '*ex improviso*', which means no more than 'unexpectedly' or 'suddenly', but in the words 'which no human ingenuity can foresee'. In the report in Carrington & Payne (1839) 9 Car & P 159 the words ascribed to Tindal CJ are: 'But if any matter arises *ex improviso*, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply'. The decisions in England allow the presiding judge at a criminal trial to call a witness if he thinks the imperative demands of justice require it. This view was acted on in Victoria (*R v Collins* [1907] VLR 292. But in *Titheradge v The King* (1917) 24 CLR 107 this court denied the power. In England the rule expressed in the language of Tindal CJ is applied alike to the power of the judge to call a witness and to his power to allow the prosecution to recall a witness or call a new witness once the case for the prosecution has closed and the prisoner has gone into his case. In *R v Frost* (1839) 4 St Tr (NS) 86 it was probably not intended to state an exhaustive rule. But how rigidly the principle against reopening the case for the prosecution was applied may be seen from the striking decision by Garrow B in *R v Stimpson* (1826) 2 Car & P 415. In the end the language of Tindal CJ has come to be used in England as a criterion (*R v Harris* [1927] 2 KB 587; *R v Liddle* (1928) 21 Cr App R 3; *R v McMahon* (1933) 24 Cr App R 95; *R v Day* (1940) 27 Cr App R 168). The earlier cases of *R v Crippen* [1911] 1 KB 149 and *R v Sullivan* [1923] 1 KB 47 seem to have allowed more flexibility. The formula adopted from Tindal CJ has little to commend it. The words 'which no human ingenuity can foresee' hardly express a legal principle. They are rhetorical, but if literally understood they lay down a test which could almost never be satisfied. Clearly, the principle is that the prosecution must present its case completely before the prisoner's answer is made. There are issues the proof of which do not lie upon the prosecution and in such cases it may have a rebutting case, as when the defence is insanity. When the prisoner seeks to prove good character evidence may be allowed in reply. But the prosecution may not split its case on any issue. The court possesses a power to allow further evidence to be called, but it must be exercised according to rule and the rule is against reopening the Crown case unless the circumstances are most exceptional. We are not disposed to lay down the rule in the terms adopted from Tindal CJ in *R v Frost* (1839) 4 St Tr (NS) 86. It is a matter of practice and procedure, and in such matters, even where the procedure is criminal and is directed to safeguarding the position of the accused, there is less reason for closely following English authority than where the development of the substantive law is involved. It is, for example, difficult to apply the rule where the jury ask for the recall of a witness or further proof or disproof of a fact. It seems to us unsafe to adopt a rigid formula in view of the almost infinite variety of difficulties that may arise at a criminal trial. It is probably enough to say that

> the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence. The argument that ss 430, 431 and 448 of the Crimes Act 1928 (Vict) combine to make it impossible for the prosecution to call further evidence after the prisoner has entered upon his defence, or at all events concluded it, is, we think, unsound. But the policy of these provisions strengthens the principle which makes a departure from the rule allowable only in exceptional circumstances. Further, although we have not thought it proper to adopt the formula of *Sir Nicholas Tindal*, the English cases make it plain enough that generally speaking an occasion will not suffice for allowing an exceptional course if it ought reasonably to have been foreseen. Again, it may be pointed out that even an unexpected occasion may be of such a nature that it would have been covered, had the Crown case been fully and strictly proved.

Dato Shafee Abdullah said that the test laid down in *R v Frost* is very rigid as recognized in the above passage. He said that the Australian courts have watered down the rigidity of the rule and that the Malaysian Courts, being bound by the English common law only, must apply the rule as originally framed. Quite obviously, this argument is anchored on the view that the test is controlled by the words '… which no human ingenuity can foresee …' attributed to the case referred to. He added that the same rule applies in cases where the onus of proof on an issue is on the accused. He then said that in this case, ample notice had been given to the prosecution that the accused would be relying on the defence of hypoglycaemia. Accordingly, he said the prosecution cannot now complain that they have been taken by surprise or that they had not expected this defence to be advanced. He said that even in cases where a special defence has been advanced, as in this case, the prosecution must show that they have been taken by surprise which they have failed to do. In support of his submission, he referred to the unreported judgment of Shaik Daud J (as he then was) in *Pendakwa Raya v Adam bin Jaafar* (Federal Territory Cr Trial No 55–2 of 1987), where the prosecution was not allowed to call evidence to rebut a defence of insanity on the ground that they were fully aware of the defence to be raised from the very beginning of the trial. As his Lordship said at pp 23–24 of his judgment in that case:

> I am of the view that the only occasion when court ought to exercise is (sic) discretion to allow prosecution to call rebuttal evidence after the close of the defence case is when the prosecution was indeed taken by surprise and the defence put up was for the very first time put up or shown during the defence case which no one could anticipate, and this is so even if the prosecution was aware of the evidence to be adduced even at the investigation stage. The burden on the prosecution never ended when the defence is called, it remained to the end. Once mens rea had been challenged it is the duty of prosecution to rebut this. All the authorities cited show that whatever the obligation of the defence the court will and should only exercise this discretion (sic) in cases where the evidence although available with prosecution ab initio the relevance of which does not arise *ex improviso*. It would be unconceivable for the prosecution to say that they were indeed taken by surprise. Prosecution also added that if they are not allowed to call these two witnesses the court ought to exercise its discretion to call them as court witnesses under s 45 (sic)

> CPC. With respect I am of the view that the principle is that the court by its own motion will and should call additional witness or evidence to rectify an omission (sic) in the prosecution case but such discretions (sic) should always be restricted to rectify an omission (sic) and not for augmenting the prosecution case. For this (sic) reasons, I dismissed the prosecution application to call rebuttal evidence and decline to use s 425 CPC to augment the prosecution case.

In the result, an order under s 348 of the Criminal Procedure Code was made. This was upheld by the (then) Supreme Court. Unfortunately, no written judgment was delivered.

The submissions advanced before me require a consideration of the right of the prosecution to split its case to enable it to call evidence after the defence has closed its case. This has been the subject matter of discussion in many cases. The authority quite frequently cited on this issue stems from the judgment of Tindal CJ in *R v Frost* (1839) Car & P 129, reported differently in other law reports, where his Lordship said at p 159:

> There can be no doubt about the general rule, that where the Crown begins a case (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso*, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply.

In some reports, the words '… which the Crown could not foresee …' have been read as '… which no human ingenuity can foresee …' resulting in a rigid application of the rule. This has been pointed out in *Shaw v R* (1952) 85 CLR 365, to which I have made reference earlier. In that case, it was held that the expression *ex improviso* means no more than 'unexpectedly' or 'suddenly'. The strictness with which the rule has been laid down with the substituted words was relaxed in *R v Crippen* [1910] 1 KB 149, where Darling J said at p 157:

> We do not feel inclined to lay down the rule as strictly as Tindal CJ did in *Reg v Frost* 4 St Tr (NS) at col 86. We do not propose to adopt the language of Tindal CJ. The rule laid down in those terms may, we think, place an unfair burden on counsel for the prosecution in some cases. We prefer to express the rule by saying that the rebutting evidence must in the first place be evidence which is admissible. Assuming it to be admissible evidence, it then becomes a question for the judge at the trial to determine in his discretion whether the evidence, not having been tendered in chief, ought to be given as rebutting evidence.

This view was followed in cases such as *R v Sullivan* (1922) 16 Cr App R 121 and *R v McKenna* (1956) 40 Cr App R 65. In *R v Owen* (1952) 36 Cr App R 16, Lord Goddard CJ said at p 21:

> Now we do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed where it becomes necessary to rebut matters which have been raised for the first time by the defence. It is much more likely that this may be necessary

A nowadays since prisoners are entitled to give evidence on their own behalf whereas in the days of Tindal CJ such evidence could not be given, and, as we have already pointed out, this court in *Crippen* declined to adopt the rule that he laid down in all its strictness. It must be a matter for the discretion of the judge which should be applied with caution ….

B In *R v Scott* (1984) 79 Cr App R 49, the restriction of the rule to evidence arising *ex improviso* as stated in *R v Pilcher* (1974) 60 Cr App R 1 was rejected by Lawton LJ as it '… seems to narrow the circumstances in which evidence can be called in rebuttal …' (at p 51) who then laid down the rule in the following terms:

C If the prosecution could reasonably have foreseen that a particular piece of evidence was necessary to prove their case they should have put it before the court as part of their case. They should not wait until the defendant has given evidence to produce that evidence. Much, however, will turn on what is reasonable.

D It will thus be observed that the rule that the proposed evidence to be given must have arisen *ex improviso* has been widened with the reasonably foreseeable test. The Malaysian position is similar. As Wan Yahya SCJ said in *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri* [1994] 3 MLJ 285 at p 293:

E It would suffice if we were to reiterate the principle that the admission of such evidence is only confined to circumstances where the evidence sought to be adduced is raised *ex impromptu* or that such evidence was not available with reasonable diligence at the time when the evidence of both parties had been closed. See *Yah bte Aji v Fatimah bte Haji Mohammed Ariffin & Ors* [1969] 2 MLJ 186; *Kesarmal & Anor v Valliappa Chettiar* [1954] MLJ 119; *Balfour v PP* [1949] MLJ Supp 8; *R v Day* [1940] 1 All ER 402; *Ladd v Marshall* [1954] 3 All ER 745. As a general principle evidence available to the adducer of fresh F or additional evidence ab initio, the relevance of which does not arise *ex improviso* which is intended to remedy defects in the adducer's own case is inadmissible.

G Contrary to the submission of Dato Shafee Abdullah, the Malaysian position is no different from that in England. In both the jurisdictions, the evidence to be adduced need not be one that no human ingenuity could have foreseen to warrant a rigid application of the rule. It is sufficient if the evidence was not reasonably foreseeable.

I now deem it pertinent to consider, what is perhaps obvious, the kind of evidence which the rule excludes. In *R v Rice* [1963] 1 QB 857, Winn J H said at p 860:

There is a general principle of practice, although no rule of law, requiring that all evidential matter that the Crown intends to rely upon as probative of the guilt of the defendant … should be adduced before the close of the prosecution's case if it be then available.

I As Winn LJ said in *R v Milliken* (1969) 53 Cr App R 330 at p 333:

Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the defendant and where it is reasonably foreseeable

> by the prosecution that some gap in the proof of guilt needs to be filled by evidence called by the prosecution, then, generally speaking, the court is likely to rule against the closing of any such gap by rebuttal evidence …

Thus, the rule only excludes evidence that is relevant to an element of the offence to be proved by the prosecution. Rebuttal evidence by the prosecution is therefore restricted to evidence to meet new facts introduced by the defence (see *R v Campbell* (1977) 38 CCC (2d) 2). It may not merely confirm or restate the case for the prosecution by calling the same or fresh witnesses (see *R v Sullivan* (1922) 16 Cr App R 121; *John v R* (1985) 23 CCC (3d) 326; *R v Krause* (1987) 29 CCC (3d) 385). As Taunton J said in *R v Hilditch* (1832) 5 Car & P 986:

> Proving that the parties were near the place at which the offence was committed is evidence in chief and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution.

In *R v Day* [1940] 1 All ER 402, for example, the trial court allowed the prosecution in a case of forgery to call a handwriting expert after the defence had closed its case. The accused's conviction was quashed by the Court of Criminal Appeal as the evidence was of a kind that was sought to remedy an obvious deficiency in the evidence in support of the case for the prosecution, and it was an endeavour to call that supplementary evidence although the material upon which that evidence was to be given had been in the hands of the prosecution from the beginning. As Hilbery J further said at p 404:

> It was evidence upon one branch of the prosecution's case, upon which it must have been realized that they must give positive evidence.

In *R v Milliken* (1969) 53 Cr App R 330, on the other hand, the Court of Appeal held that the trial court had rightly allowed the prosecution to adduce evidence in rebuttal of an allegation of a police 'frame-up' made by the accused for the first time at the trial. However, it must be observed that in practice, it may often be difficult to distinguish evidence which is properly the subject of rebuttal and evidence of facts relevant to prove the ingredients of the charge. The position is well explained by PK McWilliams QC in his book entitled *Canadian Criminal Evidence* (3rd Ed) at para 31–5:

> Clearly relevant issues may arise during the case for the defence which could not have been reasonably anticipated by the prosecution before it completed its case. Indeed, that is the test for the admissibility of rebuttal evidence. The prosecution may have some anticipation that the defence will raise a defence, be it innocent intent, accident, mistake, necessity or alibi, or that the defence may be calling some expert witness as to the state of mind of the accused or as to the cause of the injury as in *R v Campbell* (1977) 38 CCC (2d) 6 (Ont CA) and so on. The defence may give some hint of the line of its defence in the cross examination of Crown witnesses, but in many cases it would be speculative and presumptuous for Crown counsel to anticipate: *R v Perku* et al (1982) 69 CCC (2d) 405 (BCCA). It would be, moreover, difficult and

A wasteful in time because Crown counsel could not be sure of just the exact issue or evidence it had to meet. Nonetheless, the prosecution must adduce all the evidence to prove the material ingredients of the offence. The case of *R v McRitchie* (1975) 36 CCC (2d) 39 (BCCA), affd CCC loc cit (SCC), in which the defence of alibi was raised provides a nice illustration. It was held that the prosecution was improperly permitted to adduce in rebuttal, evidence placing the accused at the scene of the crime, but that it was properly permitted to adduce evidence that he was seen elsewhere at a laundromat contrary to his alibi that he had been at home.

Where the defence suggested in the course of the case for the prosecution strikes at the very core of its case and evidence to rebut the suggestion is available, the prosecution must adduce such evidence before closing its case (see *PP v Chia Leong Foo* [2000] 6 MLJ 705). It must, however, be observed that the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset (see *Thompson v R* [1918] AC 221).

The defence of an accused may include proof of a negative averment which is involved in an ingredient to be proved by the prosecution. This follows the general rule that in criminal cases, the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence, even though negative averments be involved therein (see *Over v Harwood* [1900] 1 QB 803; *R v Bourne* [1939] 1 KB 687; *R v Lobell* [1957] 1 QB 547). This position however, may be modified by statutory intervention, for example, s 105 of the Evidence Act 1950 ('s 105') which reads as follows:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

The general exceptions in the Code are in Ch IV. When an accused takes refuge under any of the general exceptions enumerated therein, the burden of proof of the exception is upon him and the absence of the circumstances will be presumed. This is because s 105 contains a presumption and a resultant rule as to burden of proof. Thus, in a case falling within s 84 of the Code, the burden of proof to establish insanity will be on the accused. There is no obligation on the prosecution to adduce evidence to show that the accused was sane at the time of the commission of the offence. In this regard, *Sarkar on Evidence* (14th Ed) Vol 2, in commenting on s 105 of the Indian Evidence Act says at p 1402:

> The duty of the accused is to introduce such evidence as will displace the presumption of the absence of circumstances bringing his case within an exception and will suffice to satisfy the court that such circumstances may have existed. The burden of the issues as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving the guilt of the accused beyond reasonable doubt.

When the burden shifts to the prosecution, it must lead evidence to establish the sanity of the accused. This is because before the burden is

discharged by the accused, the court must presume the absence of such circumstances which means that the court must regard such circumstances as non-existent, unless and until it is disproved (see *Dahyabhai v The State* AIR 1964 SC 1563). It follows that at that stage there is no obligation on the prosecution to adduce such evidence. The prosecution can therefore discharge this burden by adducing evidence only after the defence has closed its case. Thus, as Lord Alverstone CJ said in *R v Gilbert Smith* (1912) 8 Cr App R 72 at p 75:

> Evidence as to the condition of the prisoner's mind should be called, if required, in reply, and not as part of the case for the prosecution.

That would still be the position even if the prosecution had been notified that the defence will be one of insanity (see *R v Kasperek* (1951) 101 CCC 375). In further support, I refer to *Chaulk v R* (1991) 62 CCC (3d) 193 where Dickson CJC said:

> In my view, the trial judge in this case correctly allowed the Crown to adduce rebuttal evidence with respect to the issue of insanity. First, the Crown cannot be expected to adduce evidence as part of its case-in-chief to meet a defence that the accused might possibly raise; this principle is not altered by the fact that the accused may warn the Crown that it intends to raise a particular defence. Secondly, a requirement that the Crown adduce evidence in chief to establish the sanity of the accused would defeat the presumption contained in s 16(4). Section 16(4), as discussed above, posits that every person, for the purposes of the Criminal Code, is presumed to be sane until the contrary is proved. As a result, the sanity of a person accused of committing a criminal offence is not an issue until it is raised by that accused. The Crown is not obliged to prove the sanity of an accused as part of its case against such person.

Where, however, it is clear from the cross examination of witnesses for the prosecution that the defence of insanity will be raised, and it is ascertained that no evidence will be called to establish his defence, the prosecution may, before closing its case, call evidence to negative insanity (see *R v Abramovitch* (1912) 7 G App R 145). The corollary of the preceding argument is that where the proof of an issue does not lie on the prosecution, evidence in rebuttal may be led (see *R v Chin* (1985) 69 ALR 1; *Taylor v R* (1979) 22 ALR 599; *Shaw v R* (1952) 85 CLR 365). In my opinion, this exception does not apply to instances where the onus on the accused, having been created by a presumption, is a matter which the prosecution would otherwise be required to prove. I must add that where the prosecution is allowed to give evidence in rebuttal, the defence may be given the right to call evidence in surrebuttal (see *R v Therein* and Sanseverino (1943) 80 CCC 87; *R v Higgins* (1902) 7 CCC 68; *R v Wong On and Wong Gow* (1904) 10 BCR 555; *R v Morgentaler* (No 3) (1973) 14 CCC (2d) 453; *R v Chaulk* (1991) 62 CCC (3d) 193). In the light of the law that I have discussed, I am compelled to conclude that the refusal by Shaik Daud J (as he then was) to allow the prosecution to adduce evidence in rebuttal in *Pendakwa Raya v Adam bin Jaafar* cannot, with respect, be sustained in law. The fact that the order made in that case was upheld by (then) Supreme Court is not of much avail as no written judgment was delivered. The absence of a written judgment precludes a decision from being regarded as

being conclusive on the issues involved (see *Re H Daniel* [1935] MLJ 50; *Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor* [1988] 1 MLJ 174).

It is now apposite for me to deal with the application made by the prosecution to call witnesses to rebut the defence of hypoglycaemia mounted by the accused. My ratiocination of the law will reveal that if the accused carries a legal burden to establish the defence, then the prosecution has a right to call evidence in rebuttal unhindered by any restrictions. The crux of the defence case is that at the time of commission of the offence, the accused was undergoing an hypoglycaemic attack and was therefore in a state of automatism. Automatism refers to a state of defective consciousness in which a person performs unwilled acts. It may be caused by concussion, sleep disorders, acute stress, epilepsy and other ailments like hypoglycaemia. The House of Lords has held that there is in law two types of automatism, namely, insane and non-insane automatism (see *Bratty v Attorney-General for Northern Ireland* (1961) 46 Cr App R 1). Cases like *R v Hennessy* [1989] 2 All ER 9 and *R v Quick* [1973] QB 910 suggest that insane automatism is where the primary cause of the abnormality is internal to the accused and prone to recur. The condition will be classified as a disease of the mind. It will then fall within the McNaghten Rules (see *R v Barry Douglas Burgess* (1991) 93 Cr App R 41). Non-insane automatism occurs where the abnormality is caused by a factor external to the accused like, for example, a blow to the head, medication, alcohol or drugs. As Fisher J said in *Police v Bannin* [1991] 2 NZLR 237 at p 248:

> Public policy underlies the distinction drawn between sane and insane automatism. The principal consideration is that if a person is so predisposed to dissociation that he may lose control of his conduct in circumstances which other members of the community would be able to cope with, he is likely to be a continuing danger to the community. There is assumed to be a high risk that history will be repeated when he is presented with the same circumstances in the future. As the problem is essentially 'internal' to the accused, some form of treatment or oversight is then warranted to protect the community notwithstanding the absence of fault. The contrary is true if the abnormality had had an extraordinary external cause such as a blow, ingestion of a harmful substance or a personal catastrophe beyond the normal lot of mankind. Since the external event is unlikely to be repeated, there is little risk that the harmful behaviour will be repeated.

The distinction is important as it will determine the onus of proof. In thus commenting on both the classifications of automatism, Fisher J said in *Police v Bannin* [1991] 2 NZLR 237 at p 254:

> To summarize, the defence of automatism can be reduced to the question whether at the material time the accused had the mental capacity to form the particular mental ingredients of the crime with which he is charged. For this purpose, no distinction is to be drawn between sane and insane automatism. That distinction affects only the onus of proof and the ultimate disposition of the case.

As I said earlier, where the condition is a disease of the mind, it will fall within the McNaghten Rules which is reflected in s 84 of the Code. This

section, read with s 105, will place the onus on the accused to establish the defence. A similar view was taken in the case of epilepsy in *Sinnasamy v PP* [1956] MLJ 36. If the condition does not produce a disease of the mind, the onus will be upon the prosecution to exclude the alleged incapacity (see *Police v Bannin* [1991] 2 NZLR 237). On the facts of this case, and without in any way pre-judging any part of the case at this stage, the evidence shows that the cause of the accused's alleged low blood sugar and the resultant hypoglycaemic attack is not known. It is not caused by any medication and there is no evidence of it being caused by any external factor. It is prone to recur. I am therefore of the view that the abnormality of the accused must be classified as insane automatism. His defence will thus fall within s 84 of the Code. The result is that the burden is on him to establish his condition of mind at the time of the commission of the offence. The prosecution is therefore entitled to adduce evidence in rebuttal. The defence may adduce evidence in surrebuttal if there is a need for it.

Application allowed.

Reported by Lim Lee Na